U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 23 2010

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Sperry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. According to Part 6 of the Form I-140 petition, the petitioner seeks employment as an "environment research specialist." The record reflects that the petitioner seeks to run an Internet networking site where college students can exchange items rather than discard them, thus decreasing waste. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, we uphold the director's decision. Moreover, we withdraw the director's finding that the petitioner seeks to work in the professions as defined in the statute and pertinent regulations.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A)

> that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Bachelor of Science in Computer Engineering from the University of Arkansas and a Master of Business Administration (MBA) degree from Stanford University. The director accepted that the petitioner seeks to work as an environment research specialist and concluded that this position was within the professions. A review of the record as a whole, however, reveals that the petitioner actually proposes to run an Internet networking site through which college students can exchange items they might otherwise discard.

As defined at Section 101(a)(32) of the Act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The Department of Labor's Occupational Outlook Handbook provides that while many executives have at least a baccalaureate, the requirements for this position vary with the type of business. *See* http://www.bls.gov/oco/ocos012.htm#training, accessed February 4, 2010 and incorporated into the record of proceedings. We are not persuaded that running an Internet networking site falls within the professions defined at section 101(a)(32) of the Act or *requires* a baccalaureate degree pursuant to 8 C.F.R. § 204.5(k)(2).

Thus, we must consider whether the petitioner qualifies as an alien of exceptional ability. The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The criteria follow.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

As stated above, we are not persuaded that a degree is required to run an Internet networking site. Thus, the petitioner's baccalaureate and MBA are sufficient to meet this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The record contains no evidence that the petitioner has ten years of full-time experience running an Internet networking site.

A license to practice the profession or certification for a particular profession or occupation

The record contains no evidence relating to this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The record contains no evidence relating to this criterion.

Evidence of membership in professional associations

As stated above, the evidence submitted under any criterion must be considered in the context of whether it is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field. The petitioner submitted evidence that he is a member of the Association for Computing Machinery (ACM) at the University of Arkansas, the "Net Impact Class of 2007" and the Gamma Phi chapter of Eta Kappa Nu (a national electrical and computer engineering honor society). The record contains no evidence that ACM or Net Impact Class of 2007 membership is indicative of a degree of expertise significantly above that ordinarily encountered in the field. Eta Kappa Nu membership was awarded based on the petitioner's academic record according to the letter submitted. We have already accepted that the petitioner's education meets the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). We are not persuaded that an *academic* honor society is a *professional* association indicative of a degree of expertise significantly above that ordinarily encountered in the field beyond the academic degree conferred and considered under 8 C.F.R. § 204.5(k)(3)(ii)(A).

Even if we were to conclude that the petitioner meets this criterion, he would only meet two criteria. As stated above, the petitioner must meet at least three criteria to establish eligibility as an alien of exceptional ability.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner lists the following recognition on his self-serving curriculum vitae: (1) Radio Frequency Identification (RFID) EPCGlobal Excellence Recognition in Supply Chain Visibility Strategy from Wal-Mart in 2004 and 2005, (2) an honors senior design project and thesis in 2003, 2004 and 2005, (3) participation in a Wal-Mart RFID Global Standard Honors Colloquium in 2005, (4) an Economics Research Prize for First Position in 1999 and (5) an ISI Best Science Project Award in 1996 and 1997. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

[redacted] of the University of Arkansas asserts that the petitioner was instrumental in establishing the RFID laboratory at the University of Arkansas and that his ideas were implemented by Wal-Mart. [redacted] does not suggest that Wal-Mart issued any formal award or recognition to the petitioner and the record does not contain a formal certificate issued by Wal-Mart to the petitioner.

While the petitioner submitted his honor's thesis, a completed thesis within an honors program does not constitute recognition for achievements and significant contribution to the field from peers, governmental entities or professional or business organizations.

The record does not include the other accolades listed on the petitioner's self-serving curriculum vitae. Moreover, not all of them appear to be formal recognition for achievements and significant contribution to the field from peers, governmental entities or professional or business organizations. For example, simply participating in a colloquium sponsored by one's employer is not formal recognition for achievements and significant contributions.

The record does contain some local media coverage of the petitioner's networking site. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), however, does not include recognition from the media. Regardless, the media coverage is minimal, limited to the project's potential and primarily local. This coverage is not formal recognition for achievements and significant contributions to the field of networking applications.

In light of the above, the petitioner has not established that he meets this criterion.

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, Internet networking applications. The director concluded that the availability of the petitioner's networking

site, Techtain,[1] to individuals nationally through the Internet is insufficient to establish a benefit that is national in scope.

At the outset, we note that the record is somewhat inconsistent regarding the extent of Techtain. [redacted] of Peninsula Sanitary Service, which services Stanford University, asserts that Techtain covers "all American Colleges" although she does not explain her first hand knowledge of this assertion. [redacted] a professor at the University of Arkansas, asserts that the petitioner started Techtain at Stanford University and that Techtain is "growing to cover all US colleges and universities." [redacted], a postdoctoral scholar at Woods Hole Oceanographic Institution in Massachusetts, asserts that Techtain is "now extending to over two thousand campus networks in the US alone." [redacted] Associate Director for External Relations at the Haas Center for Public Service at Stanford University, asserts that Techtain "is being implemented at all universities and community colleges across the nation, and is accessible to anyone with an '.edu' domain in his or her e-mail address." [redacted] to the Chancellor at the University of Arkansas, states that he is "anxious to see Project Techtain's nationwide platform across all 50 states and the promise this project can deliver." [redacted] and Director of Stanford Eating [redacted] asserts that he has held informational training sessions with the petitioner as part of the company's Target Zero Waste campaign and estimates that "if successfully implemented, [the petitioner's] efforts with Techtain could help divert upwards of 3% of Stanford's total landfill capacity." A June 9, 2007 article in the *Stanford Report* states that the petitioner's "nascent site has been open only to students at Stanford and a few other campuses."

On appeal, the petitioner asserts that he has demonstrated that 85,000 transactions on Techtain redistributed 192,000 items as of the date of filing. The petitioner has submitted what appear to be Techtain data reflecting users from across the United States. Significantly, at issue is whether the *proposed* benefits would be national in scope. While that test requires more than a speculation that a local program could be expanded nationally, we are satisfied that the *proposed* benefits in this matter, the redistribution of items at college campuses nationwide through an Internet site, are national in scope.

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[1] The petitioner submitted the Certificate of Qualification for Techtain, a Delaware corporation, to transact business in California. While the appeal includes a letter on Techtain's letterhead listing a California address, we note that this corporation's status is now listed as "surrender" in California. *See* http://kepler.sos.ca.gov/cbs.aspx. This status means that Techtain is a foreign corporation that has surrendered its right to transact business in California. *See* http://www.sos.ca.gov/business/be/cbs-field-status-definitions.htm#status. Website materials accessed on February 4, 2010 and incorporated into the record of proceeding. The record contains no evidence that Techtain is now operating from a different state. In any future filing, the petitioner will need to explain how he will benefit the national interest through Techtain in light the fact that it is not permitted to transact business.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. On appeal, the petitioner notes that he would be self-employed and would not be replacing an available U.S. worker.

U.S. Citizenship and Immigration Services (USCIS) acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for an alien employment certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of an alien employment certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5. We note that Congress did create a separate visa category for alien entrepreneurs, set forth at section 203(b)(5) of the Act, through which an alien must invest at least $500,000 (depending on the location) and create at least 10 jobs. Entrepreneurs are not precluded from seeking classification under section 203(b)(2) of the Act pursuant to the national interest waiver. As Congress has identified the type of entrepreneurs it wishes to admit into the United States, however, entrepreneurship in and of itself is not a basis for a national interest waiver.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. We acknowledge that the record contains a patent application filed by the petitioner and his RFID grant proposal. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner and several of his references address the petitioner's previous work with RFID at the University of Arkansas, Sam M. Walton School of Business, and Wal-Mart. While [redacted] asserts that the petitioner's work on RFID was implemented by Wal-Mart and will set an example for other retailers, the record does not include any letters from Wal-Mart confirming the importance of the petitioner's work to their use of RFID or from other retailers adopting Wal-Mart's use of RFID. [redacted] further asserts that there is a shortage of RFID talent in the United States. As stated above, however, special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under

the jurisdiction of the Department of Labor. *Id.* at 221. Moreover, the petitioner is not proposing to work in the RFID field. Rather, he is proposing to run an Internet networking site for the redistribution of goods that would otherwise end up in landfills.

On appeal, the petitioner submits a letter from [redacted] of Intel China. The petitioner asserts that this letter demonstrates that he was directly responsible for the wireless-blanket model used in Philadelphia and his work with global corporations and national governments. [redacted] discusses the petitioner's wireless coverage proposals and asserts:

> Amazingly, today, models similar to [the petitioner's] proposal are used here in America and the Philadelphia Wireless Project, as a matter of fact, uses the precise models [the petitioner] proposed in 2005.

[redacted] does not suggest that the petitioner was actively involved in Philadelphia's Wireless Project and the record contains no letters from those involved in Philadelphia's project confirming that they adopted this model after reviewing the petitioner's proposals.

[redacted] further states that he gave the petitioner contacts with a Nigerian firm that had a memo of understanding with Intel to deploy WiMax in Africa and that the petitioner proposed his ideas to the Nigerian government. [redacted] does not suggest that Nigeria adopted the petitioner's proposals and the record contains no evidence from the Nigerian company or government confirming their use of the petitioner's proposals. Regardless, the petitioner does not propose to work in the area of WiMax in the United States. Rather, he proposes to run a networking exchange site on the Internet.

The petitioner explains that Techtain will match a student customer's wish list with available items listed by other students nearby and let the students know of matches. The petitioner submitted letters from colleagues at Stanford University and the University of Arkansas praising Techtain and its goals of reducing waste. Another reference, [redacted] does not explain exactly how he knows the petitioner. The petitioner also submitted letters from independent references who had not previously heard of Techtain but who support the petition after discussing the project with the petitioner.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of a project's potential are less persuasive than letters that provide specific examples of how the petitioner has already influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have been influenced by his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's project and provide an opinion based solely on this review.

The letters from the petitioner's colleagues appear to provide little detail as to how the references have first hand knowledge of Techtain's use beyond Stanford University. The independent references are basing their opinions solely on the petitioner's self-serving representations to those references.

The record does contain limited media coverage of Techtain and the petitioner. Specifically, the record contains reports in the *Stanford Report.* A June 6, 2007 article notes that the petitioner declined to sign a sustainability pledge but has co-founded a website using algorithms to match individuals seeking to give away items with nearby individuals seeking similar items. The article describes the site as "nascent." Techtain has also been mentioned on the online *Vator Reports.* The record contains no evidence about the significance of this media. In addition, the petitioner entered Techtain into a competition on www.matternetwork.com. The record does not reveal how Techtain performed in the competition and the petitioner's own description of Techtain in entering the contest cannot constitute independent media coverage of Techtain. An October 31, 2007 edition of the *Stanford Daily* notes that Techtain, originally a local company, "has now expanded to other campuses." In this article, the petitioner admits that eBay and Craigslist offers similar services but contends that Techtain differs in that it was designed to solve environmental problems and is limited to students who are more likely to trade with other students. A one-paragraph story in *The Heights,* Boston College's newspaper, strongly implies that Techtain is limited to Stanford University.

While the record appears to document a growing use of Techtain, not every Internet business that attracts users warrants a waiver of the alien employment certification process in the national interest. The petitioner's environmental claims remain highly speculative. Specifically, the petitioner has not explained how he has calculated the classification of items exchanged and carbon dioxide diverted as listed on his data sheets, exhibit 4 on appeal. We note that the platform view of Techtain exchanges, submitted as exhibit 10 on appeal, shows items such as "1 big HUG," oatmeal cookies, tea, other snacks and construction help being exchanged. The petitioner has not demonstrated how the exchange of these items has diverted trash from landfills and is any more useful in this regard than previous trading networking sites such as the widely used Craigslist. [redacted], asserts that universities do not announce the use of Techtain on campus any more than they announce the use of Facebook. Facebook, however, is widely covered in the national media.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.